

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT TRACEY SPENCER,

Plaintiff,

v.

CAROL PORTER,

Defendant.

Case No. C06-5310 RJB/KLS

REPORT AND RECOMMENDATION

**NOTED FOR:
SEPTEMBER 8, 2006**

This civil rights action has been referred to the undersigned United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Plaintiff was given leave to proceed *in forma pauperis*. On July 5, 2006, plaintiff filed his complaint alleging medical negligence. Plaintiff was ordered to amend his complaint, which he has failed to do. This report follows, recommending that his complaint be dismissed with prejudice.

DISCUSSION

Following its initial review of the plaintiff's complaint, the court noted that plaintiff failed to allege a constitutional harm. To state a claim under 42 U.S.C. § 1983, the defendant must be a person acting under color of state law; and his conduct must have deprived the plaintiff of rights,

1 privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor,
2 451 U.S. 527, 535 (1981), *overruled in part on other grounds by* Daniels v. Williams, 474 U.S. 327
3 (1986). Implicit in the second element is a third element of causation. See Mt. Healthy City School
4 Dist. v. Doyle, 429 U.S. 274, 286-87 (1977); Flores v. Pierce, 617 F.2d 1386, 1390-91 (9th Cir.
5 1980), *cert. denied*, 449 U.S. 875 (1980). When a plaintiff fails to allege or establish one of the
6 three elements, his complaint must be dismissed.

7 In this case, Plaintiff's only claim is a violation of the Eighth Amendment. Plaintiff alleges
8 that the prison medical staff was negligent in administering his medicine. This allegation is
9 insufficient to state a section 1983 claim. The Eighth Amendment requires prison officials to take
10 reasonable measures to guarantee the health and safety of inmates. Hudson v. Palmer, 468 U.S. 517,
11 526-27 (1984); Farmer v. Brennan, 511 U.S. 825, 834 (1994). An inmate claiming an Eighth
12 Amendment violation relating to health care must show that the prison officials acted with deliberate
13 indifference to a serious medical need. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The plaintiff
14 must prove an objective and a subjective component. Hudson v. McMillan, 503 U.S. 1 (1992);
15 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992). First, the alleged deprivation must be,
16 objectively, "sufficiently serious." Farmer, 511 U.S. at 834. A "serious medical need" exists if the
17 failure to treat a prisoner's condition would result in further significant injury or the unnecessary and
18 wanton infliction of pain contrary to contemporary standards of decency. Helling v. McKinney, 509
19 U.S. 25, 32-35 (1993); McGuckin, 974 F.2d at 1059. Second, the prison officials must be
20 deliberately indifferent to the risk of harm to the inmate. Farmer, 511 U.S. at 834. An official is
21 deliberately indifferent to a serious medical need if the official "knows of and disregards an excessive
22 risk to inmate health or safety." Id. at 837. Deliberate indifference requires more culpability than
23 ordinary lack of due care for a prisoner's health. Id. at 835. In assessing whether the official acted
24 with deliberate indifference, a court's inquiry must focus on what the prison official actually
25 perceived, not what the official should have known. See Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th
26 Cir. 1995). If one of the components is not established, the court need not inquire as to the existence
27 of the other. Helling, 509 U.S. 25.

1 Prison authorities have “wide discretion” in the medical treatment afforded prisoners. Stiltner
2 v. Rhay, 371 F.2d 420, 421 (9th Cir. 1971), *cert. denied*, 387 U.S. 922 (1972). To prevail on an
3 Eighth Amendment medical claim, the plaintiff must “show that the course of treatment the doctors
4 chose was medically unacceptable under the circumstances . . . and the plaintiff must show that they
5 chose this course in conscious disregard of an excessive risk to plaintiff’s health.” Jackson v.
6 McIntosh, 90 F.3d 330, 332 (9th Cir. 1996), *cert. denied*, 519 U.S. 1029. A claim of mere
7 negligence or harassment related to medical problems is not enough to make out a violation of the
8 Eighth Amendment. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Simple malpractice,
9 or even gross negligence, does not constitute deliberate indifference. McGuckin, 974 F.2d at 1059.
10 Similarly, a difference of opinion between a prisoner-patient and prison medical authorities regarding
11 what treatment is proper and necessary does not give rise to a § 1983 claim. Franklin, 662 F.2d at
12 1344; Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970).

13 Accordingly, plaintiff was instructed to file an amended complaint curing, if possible, the
14 above-mentioned defect by August 1, 2006. He was further advised that if he failed to adequately
15 correct the deficiencies identified in the court’s order, the court would recommended dismissal of his
16 action as frivolous. Plaintiff did not file an amended complaint by the August 1 deadline nor did he
17 seek an extension of the deadline.

18 19 CONCLUSION

20 Plaintiff was ordered to amend his complaint. (Dkt. # 6). Plaintiff has not complied with the
21 court’s order nor has he sought an extension of the deadline. The court recommends the action be
22 **DISMISSED WITH PREJUDICE**. A proposed order accompanies this Report and
23 Recommendation.

24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
25 the parties shall have ten (10) days from service of this Report and Recommendation to file written
26 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
27 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time

1 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **September**
2 **8, 2006**, as noted in the caption.

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4 DATED this 10th day of August, 2006.

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8 Karen L. Strombom
9 United States Magistrate Judge
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